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January 17, 2003

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*

Dear Ms. Dortch:

BellSouth Corporation, SBC Communications Inc., Qwest Communications International Inc., and the Verizon telephone companies provide this further detail in support of their request that the Commission, in connection with its resolution of the issues in this proceeding, re-examine its so-called "pick-and-choose" rule, 47 C.F.R. § 51.809, which was adopted in 1996 to implement 47 U.S.C. § 252(i). *See, e.g.*, letter from Michael E. Glover and Susanne Guyer, Verizon, to William F. Maher, FCC, at 5 (filed Jan. 10, 2003). That rule, if left unchanged, may interfere significantly with the full realization of the Commission's objectives in this proceeding.

The existing rule permits a competitive local exchange carrier ("CLEC") to cherry-pick individual provisions of any approved interconnection agreement previously negotiated under § 252 between an incumbent local exchange carrier ("ILEC") and another CLEC, without any obligation to accept the remaining provisions of the agreement. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999). An incumbent carrier cannot safely engage in ordinary "give-and-take" negotiations because, under the Commission's existing interpretation of § 252(i), "every concession . . . made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant," without regard to the concession made by the original CLEC in exchange for that benefit. *Id.* at 395.

If the Commission determines to eliminate the requirement that incumbent carriers provide requesting CLECs with all the network elements necessary for the UNE platform, then the Commission should adopt policies designed to provide market-based incentives for incumbents and CLECs to negotiate innovative commercial alternatives to the UNE platform. It is crucial that the Commission also make clear that such individually negotiated arrangements will not be subject to pick-and-choose under § 252(i).

That principle flows directly from the terms of the statute. Section 252 applies only to "a request for interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. § 252(a)(1) (emphasis added). To the extent that switching, for example, need no longer be made available as an unbundled network element for purposes of § 251(c)(3), a commercially negotiated agreement that calls for the provision of switching is no more within the scope of § 252 than is a provision dealing with issues entirely unrelated to the subject matter of §§ 251 and 252 (for example, a provision for the rental of storefront real estate owned by an ILEC). The Commission necessarily so held in its recent ruling that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1)." *See Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, ¶ 8 n.26 (2002); *cf. id.* ¶ 3 (noting Qwest had argued that § 252(a)(1) does not require the filing with state commissions of agreements pertaining to "network elements that have been removed from the national list of elements subject to mandatory unbundling"). To the extent such an offering constitutes a telecommunications service, it would of course be subject to the general nondiscrimination obligations of § 202.

More broadly, in light of its extensive experience since 1996, the Commission should modify the pick-and-choose rule to eliminate its deleterious effect on meaningful negotiations. Congress plainly preferred that carriers establish interconnection arrangements without the need for regulatory intervention; it sought to stimulate the kind of vibrant give-and-take common in ordinary commercial negotiations, in the expectation that the parties themselves are far better equipped than government to devise arrangements that meet their individual needs. That is why the Act requires carriers to negotiate in good faith (§ 251(c)(1)), provides an opportunity for state-commission mediation (§ 252(a)(2)), and allows carriers to enter into binding negotiated agreements without regard to the Act's requirements (§ 252(a)(1)). After more than 6 years of experience with the pick-and-choose rule, it should now be obvious that the rule strongly discourages the free-wheeling negotiations that Congress envisioned.

This issue has already been the subject of debate in another proceeding currently pending before the Commission. In a petition filed in 2001, CLEC Mpower Communications, Inc. urged the Commission to modify the pick-and-choose rule because it has long "inhibit[ed] innovative deal-making," with the result that "interconnection agreements are increasingly standardized." Petition for Forbearance and Rulemaking at 9, *Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose"*, CC Docket No. 01-117 (FCC filed May 25, 2001) ("Mpower Pet."). "There is a great sameness and very little meaningful choice. The ability to innovate and the incentive to do so are sorely needed." *Id.* Other parties confirmed Mpower's experience. *See, e.g.*, Comments of Verizon at 2, CC Docket No. 01-117 (FCC filed July 3, 2001); Reply Comments of USTA at 4, CC Docket No. 01-117 (FCC filed July 18, 2001). As the Fourth Circuit has explained, "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

To rectify this problem, Mpower "request[ed] that the Commission establish a new flexible contract mechanism" to which the pick-and-choose provisions would not apply. Public Notice, *Pleading Cycle Established for Comments on Mpower Petition for Forbearance and Rulemaking*, 16 FCC Rcd

11889, 11889 (2001); *id.* (stating that, under Mpower's proposal, this flexible contract mechanism "would be in addition to the UNE 'safety net'"). Such a regime, according to Mpower, would encourage mutually beneficial commercial business relationships between ILECs and CLECs, as opposed to the adversarial, regulation-based relationships that more typically exist today. *See* Mpower Pet. at 8 ("if competition is to proceed apace, increasingly market-driven business principles must apply rather than mere regulatory requirements"); *id.* at 6-10.

The concerns that underlie Mpower's submissions are very real. Eliminating the pick-and-choose rule entirely, not merely for Mpower's proposed flexible contract mechanism, would promote important statutory goals that have thus far been ill-served. If an incumbent carrier agrees to go beyond what the Act requires in one respect, in exchange for a CLEC's agreement to give up a right granted by the Act in a different respect, then a subsequent CLEC should not be allowed to demand the incumbent's concession without providing the same offsetting bargain given by the original CLEC. Under the current regime, the incumbent cannot know the extent of its commitments because it cannot know to whom else it will be forced to extend each isolated concession.[1] Thus pick-and-choose deters genuine commercial negotiations designed to accommodate the parties' specific needs and to produce an agreement that serves them most efficiently. Instead, negotiations have focused almost entirely on the specific language of terms designed simply to comply with the Act's minimum requirements. Rather than individualized agreements reached through "voluntary negotiations" irrespective of the Act's requirements, 47 U.S.C. § 252(a)(1), which Congress envisioned, the pick-and-choose rule has produced one-size-fits-all agreements that function much like generally applicable tariffs.

The Commission should free carriers to engage in robust negotiations that have the promise of producing creative and innovative arrangements individually designed to meet the varying needs of carriers. Without the dampening effect of the current pick-and-choose rule, carriers can be expected to conduct more meaningful negotiations and may reach agreements that work to the benefit of both parties, as well as the customers they serve. The Commission should eliminate the pick-and-choose rule now so that it can bring these benefits most quickly to the marketplace.

The Commission has ample authority to eliminate the pick-and-choose rule and thus limit opt-in rights to entire agreements, for nothing in § 252(i) required it to adopt that rule in the first place. *See, e.g., Oxy USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995) (agency may change course by "supply[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed") (internal quotation marks omitted). Section 252(i) requires only that an incumbent carrier make the relevant services available to a requesting carrier "upon the same terms and conditions." The

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1 The rule does require a CLEC to take other terms that the ILEC can "prove" were "legitimately related to the purchase of the individual element being sought." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1315 (1996) ("*Local Competition Order*"). But the ILEC "may not" treat terms governing sale of one element or service as part of the terms that produced agreement on another element or service. *Id.* This artificial compartmentalization of every issue ignores the reality that complex commercial agreements involving multiple services must be viewed as a whole: one party may accept a somewhat disadvantageous tradeoff in exchange for a separate advantageous tradeoff. Moreover, forcing an ILEC to disclose this type of detailed give-and-take analysis during negotiations in order to be able to prove later that particular terms were "legitimately related" has its own chilling effect on negotiations. In addition, the Commission's statement in 1996 that ILECs could somehow discourage opt-in of entire agreements by "insert[ing] into its agreement onerous terms for a service or element that the original carrier does not need," *id.* ¶ 1312, ignores the fact that any agreement reached under § 252 must be approved by a state commission. State commission are amply equipped to reject any attempt to lard such unrelated terms in a § 252 agreement.

Commission is free to determine, in light of its experience under the Act and in furtherance of the Act's preference for negotiated agreements, that this statutory text is now best understood to require CLECs to accept *all* the terms and tradeoffs in an agreement, not merely the separate subsets of terms that it prefers. This would ensure that an incumbent cannot restrict a particular service to a specific carrier, and that a second entrant can step into the shoes of the earlier one if it wishes to accept the deal the earlier one has struck.

Nothing in *AT&T Corp. v. Iowa Utilities Board* bars the Commission's path. Although the Supreme Court affirmed the pick-and-choose rule under *Chevron*[2] review as a reasonable reading of § 252(i), the Court expressly labeled "eminently fair" the principle that "[a] carrier who wants one term from an existing agreement . . . should be required to accept *all* the terms in the agreement." 525 U.S. at 395-96. As the incumbents argued there, the rule "threatens the give-and-take of negotiations, because every concession as to an 'interconnection, service, or network element arrangement' made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant into the market." *Id.* at 395
(quoting 47 C.F.R. § 51.809(a)).[3] In upholding the pick-and-choose rule as "reasonable," the Court added that the rule was "the most readily apparent" interpretation of § 252(i) because "it tracks the pertinent statutory language almost exactly." *Id.* at 396. But the Court also explained (in the same paragraph) that concerns that the rule would hinder the negotiation of interconnection agreements "is a matter eminently within the expertise of the Commission and eminently beyond our ken." *Id.*

The Court thus held, under step two of *Chevron*, only that the Commission's rule was a "reasonable" interpretation of § 252(i), not that it was compelled. Otherwise, the Court would not — indeed, could not — have left it open to the Commission, on the basis of its "expertise" (*id.*), to consider countervailing arguments for not imposing pick-and-choose. The Commission has likewise understood the Court's opinion to hold only that the rule is a "reasonable interpretation of section 252(i) of the 1996 Act," not the only possible interpretation of that provision. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 20 n.29 (1999), *remanded on other grounds, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *petition for cert. pending*, No. 02-858 (U.S. filed Dec. 3, 2002).[4] The Court's previous *Chevron* step two holding, therefore, "is not a finding that Congress clearly resolved the issue, and it leaves the Commission free to choose the other if reasonable." *Clinchfield Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 895 F.2d 773, 777-78 (D.C. Cir. 1990) (holding that agency may replace a previously affirmed reasonable interpretation of a statute with a different reasonable interpretation, even if a subsequent reviewing court were to "assume that the Commission's former view

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2 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

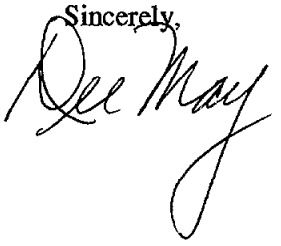
3 Although the Commission recognized these concerns when promulgating the rule, we respectfully submit that it gave them inadequate weight. *See Local Competition Order* ¶ 1313 (noting contentions "that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise"), *vacated in relevant part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in relevant part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

4 As the Eighth Circuit explained, the reference in § 252(i) to "any interconnection, service, or network element" "do[es] not foreclose the possibility that an entrant's selection of an individual provision of a prior agreement would require it to accept the terms of the entire agreement." *Iowa Utils. Bd.*, 120 F.3d at 800 n.22. Although the Supreme Court reversed the Eighth Circuit's holding that the pick-and-choose rule was an unreasonable reading of § 252(i), both courts necessarily made their rulings under the second step of *Chevron*, thus making clear that the Commission has statutory authority either to eliminate or to retain the pick-and-choose rule.

was the better one"); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 508 (1978) ("The authority of the Board to modify its construction of the Act in light of its cumulative experience is, of course, clear."); *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1255 (D.C. Cir. 1996) (upholding "about-face" where "the Commission provide[d] a reasoned analysis based upon its experience under the [prior rule]," which had "serve[d] the purpose of the statute less well" than originally anticipated).

The Commission should therefore re-examine and repeal the pick-and-choose rule in the context of this Triennial Review proceeding, in order to encourage more flexible, give-and-take negotiations designed to establish efficient interconnection arrangements.

Sincerely,



cc: W. Maher
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